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Commission on Freedom of Information and Individual Privacy

Information Access and Crown Corporations

Research Publication **14**

INFORMATION ACCESS AND CROWN CORPORATIONS

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FOREWORD

The Commission on Freedom of Information and Individual Privacy was established by the government of Ontario in March, 1977, to "study and report to the Attorney General of Ontario on ways and means to improve the public information policies and relevant legislation and procedures of the government of Ontario, and to examine:

1. Public information practices of other jurisdictions in order to consider possible changes which are compatible with the parliamentary traditions of the government of Ontario and complementary to the mechanisms that presently exist for the protection of the rights of individuals;

2. The individual's right of access and appeal in relation to the use of government information;

3. The categories of government information which should be treated as confidential in order to protect the public interest;

4. The effectiveness of present procedures for the dissemination of government information to the public;

5. The protection of individual privacy and the right of recourse in regard to the use of government records."

To the best of our knowledge it is the only Commission of its kind whose mandate embraces both freedom of information and individual privacy. The views of the public were embodied in the briefs submitted and in the series of hearings held in ten communities, and covering both Northern and Southern Ontario. In response to public demand, three sets of hearings, widely separated in time, were held in Toronto.

The views of the scholars and experts in the field are to be found in the present series of research reports of which this is number 14. These, together with the briefs submitted, constitute the backbone of our findings: the stuff out of which our Report will be made. Many of these stand in their own right as documents of importance to this field of study; hence our decision to publish them immediately.

It is our confident expectation that they will be received by the interested public with the same interest and enthusiasm they generated in us. Many tackle problem areas never before explored in the context of freedom of information and individual privacy in Canada. Many turn up facts, acts, policies and procedures hitherto unknown to the general public.

In short, we feel that the Commission has done itself and the province a good turn by having these matters looked into and that we therefore have an obligation in the name of freedom of information to make them available to all who care to read them.

It goes without saying that the views expressed are those of the authors concerned; none of whom speak for the Commission.

D. C. Williams
Chairman

PREFACE

The Commission's research program has attempted to identify features of the Ontario political environment which distinguish it from other jurisdictions which have adopted freedom of information laws, and to assess the significance of such differences for a policy on public access to government information. The prominent role assumed in the Canadian political environment by public enterprise, typically conducted in the form of the Crown corporation, is a structural element of our political life which is not found to the same degree in the United States of America. Thus, the Commission decided to conduct a specific examination of Ontario Crown corporations with a view to determining the implications of applying information access policies to their operations.

A detailed examination of the current information practices of all Ontario Crown corporations would be a gargantuan undertaking. Problems of definition undermine any attempt to provide an authoritative count of the current number of Ontario Crown corporations. Nonetheless, it is no exaggeration to state that dozens of such institutions have been established by the government of Ontario to carry out a broad range of governmental objectives. In the present paper, an attempt has been made to provide a typography of these institutions and to identify, and examine more carefully, those types of Crown corporations which appear particularly problematic from the point of view of information access policy.

As the author of this paper indicates, many Crown corporations are essentially similar, in terms of their day to day operations and their public policy objectives, to ordinary branches of government ministries. The corporate form of organization is used for purposes of administrative convenience. Presumptively, then, whatever information access policies are appropriate for the ministries of the government should also apply to these Crown corporations. More difficult questions arise, however, with respect to those Crown corporations that are engaged in commercial activity in the sense of supplying goods and services at a price to members of the public. Hence, the bulk of this paper examines the information practices and policies of a number of the more important Ontario Crown corporations engaged in this kind of activity.

It is the author's view that the arguments favouring the coverage of commercial Crown corporations by freedom of information policies are compelling. He recommends, therefore, that all Crown corporations should be embraced by any proposed freedom of information scheme. The author does point out, however, that exemptions specifically tailored to the commercial character of such corporations are lacking in the U.S. Freedom of Information Act and ought to be included in any Ontario scheme.

The author, Professor I.A. Litvak, is a public policy specialist at the Faculty of Administrative Studies of York University. When first engaged by the Commission, Professor Litvak was a member of the faculty of Carleton University. Over the past 20 years, Professor Litvak has published numerous articles and books in his areas of interest which include marketing, the activities of multi-national enterprises, business-government relations, and various aspects of public policy pertinent to the private sector. During the summer of 1979, research assistance was provided by Mr. Abe I. Greenbaum, a recent graduate of Osgoode Hall Law School who is currently engaged in graduate study at the School of Law of New York University.

The Commission has resolved to make available to the public its background research papers in the hope that they might stimulate public discussion. It should be emphasized, however, that the views expressed in this paper are those of the author and do not necessarily represent the views of the Commission.

Particulars of other research papers which have been published to date by the Commission are to be found on pages 77-78.

John D. McCamus
Director of Research

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Although the views expressed in this paper and responsibility for its contents are mine, I wish to thank D. Gracey for sharing his thoughts with me and for reviewing the first draft. Acknowledgement is also due to A. Greenbaum for his research assistance.

Isaiah A. Litvak

CHAPTER I

INTRODUCTION

The information policies and practices of Crown corporations are receiving increasing attention. This interest can be attributed to three current developments: first, public awareness concerning questionable commercial activities and conduct of certain Crown corporations such as Air Canada and Atomic Energy of Canada Limited. Parliamentary committees, governmental inquiries and auditors, royal commissions and task forces have criticized both federal and provincial Crown corporations for their poor information and accounting performance, which in certain instances camouflaged commercial activities considered to be improper. Such criticism tends to emphasize the political dimension of the problem; namely, the issue of responsibility and accountability.

Second, the increasing size of government and its regulatory impact on society has come under sharp attack by numerous interest groups. The theme of deregulation and privatization is emerging as a major political issue. For example, on June 28, 1977, Ontario's Standing Procedural Affairs Committee was empowered "to review the operation of particular boards, agencies and commissions, for which annual reports

have been tabled in the House and referred to it."[1] One objective of this investigation is to ascertain which of Ontario's non-departmental government organizations are redundant. Such judgment requires facts, and to this end the Committee designed a questionnaire to be completed by the government organizations in question. A cursory examination of the questionnaire (Appendix A) might suggest that the information requested should be public knowledge and easily accessible. Generally speaking, however,

> one aspect of government involvement in the economy that is often obliquely referred to but almost never subjected to careful examination is the fact of government business — the ubiquitous Crown corporation. 2

Total revenue earned by federal and provincial Crown corporations approximate 10% of Canada's gross national product.[3]

Third, the political character of Crown corporations has come under closer scrutiny as the issue of responsibility and accountability is being debated in Parliament. The political and economic justification for the establishment of such enterprises and the explicit pursuit of public interest goals, demands a higher degree of disclosure and community participation than might be expected from private sector

1 Journals of the Legislative Assembly of Ontario, 31st Parliament (June 27 - December 16, 1977), June 28, 1977, at 22.

2 Michael Walker, "Measuring Government Intervention," paper presented at the Canadian Investment Seminar, University of Western Ontario, London, Ontario, July 12, 1978, at 5.

3 Id., at 22.

corporations. Incomplete and misleading information appear to characterize the public information practices of many Crown corporations. In cases where disclosure is reasonably satisfactory, the presentation of the material is often complex and relatively inaccessible, suggesting that the authors of the reports are averse to informing and stimulating the interest of the public at large.

The call for greater disclosure and easier access to information is linked to the promotion of the public interest, since more and better information is one of the surest ways of protecting the public interest. This philosophy is no less important in the case of Crown corporations, including those involved in the production of or dealing in goods and the supplying of services to the public. These corporations tend to straddle the "twilight zone" by virtue of their ownership character which is politically rooted, yet operate in the business arena because their mandate is conditioned by economic considerations.

Nonetheless, it is the author's recommendation that all Crown corporations should be covered by a freedom of information statute. This legislation, however, should contain adequate exemptions to ensure that the application of its provisions does not destroy the rationale underlying the establishment of Crown corporations. These corporations are but one form of government organization, and any freedom of information legislation on public access to documents should include this non-departmental form of government organization.

The Crown corporation is not a recent creation in Canada. In fact, the concept predates Confederation. The first was established in 1841 by Lord Sydenham, Governor of the United Provinces, when he set up a Board of Works with a corporate form to facilitate the construction of a canal system.[4]

Then, as now, the Crown corporation's role has been as an instrument for implementing public policy, whether to build a canal as in 1841 or to provide the province with electrical power at cost, as is the present mandate of Ontario Hydro. The corporate rather than departmental form is used so as to establish operational independence, either for the purpose of insulating the corporation's activities from "political" supervision either by the legislature or the Executive and to preserve autonomy for the business in its day to day operations, or simply for reasons of administrative convenience.

Although Crown corporations are, to some extent, established to ensure a degree of autonomy, there are several reasons why many argue that these same corporations should be included within the scope of government information disclosure policies. Due to their nature as an instrument of public policy and often as monopolistic supplier of essential goods and services, Crown corporations have become a substantial influence

4 For a more detailed account of the history of Crown corporations in Canada, see: Canada, Privy Council Office, Crown Corporations (Ottawa: Minister of Supply and Services, 1977) at 11-13.

on the economy. Their economic influence is ubiquitous. Compelling evidence of their significance is to be found in the payments made from the Consolidated Revenue Fund to offset corporate operating deficits. Even when they are financially self-sufficient, however, Crown corporations have great impact as an employer, providing tens of thousands of jobs thereby causing a secondary and tertiary spending impact by employees. The Crown corporation is also a large purchaser of raw materials as well as a major exporter and importer of a wide range of goods and services.

In light of its important role in the economy and its existence as an instrument of public policy, a persuasive argument can be made that Crown corporations be held accountable for their actions to the same degree as government in general. Information disclosure policies should, for these reasons, apply to Crown corporations subject to certain exemptions relating to their commercial activities to be outlined later in this paper.

Fashioning a definition of the term "Crown corporation" has proven to be a very difficult task. Although it is a term which is often used (and more often misused), it has not attracted much attention from legal scholars or legislative draftsmen.

Various attempts have been made to identify the essential characteristics of the Crown corporation, but there appears to be a lack of consensus

on this question. The only attempt by the government of Canada at legislative definition is to be found in the Financial Administration Act, R.S.C. 1970, c. F-10. Section 66 defines "Crown corporation" as

> a corporation that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs and includes the corporations named in Schedule B, Schedule C and Schedule D.

The inadequacy of this definition was pointed out in the 1977 Privy Council Office report, "Crown Corporations: Direction Control Accountability."[5] The reader must look beyond the words of the definition to the schedules to see if the entity in question is a Crown corporation. Further, it is unclear whether a corporation not listed in one of the schedules is or is not a Crown corporation. The PCO report recommended that the FAA definition of Crown corporation be clarified by including therein only those corporations that are "... wholly owned by the government of Canada either directly or indirectly."[6]

The Management Board of Ontario in its 1974 report[7] did not address itself directly to the question of defining the Crown corporation concept. They did define "government agency" as:

5 Canada, Privy Council Office, Crown Corporations, op.cit.

6 Id., at 37.

7 Ontario, Management Board of Cabinet, Agencies, Boards and Commissions in the Government of Ontario (Toronto: Management Policy Division, 1974).

> [an] organizational unit of government which is a component of a ministerial portfolio receiving a particular form of delegated authority and representing one alternative to the departmental structure as a means of assisting in the formation of government policy, or delivering governmental programs, or executing the government's regulatory responsibilities. 8

The report classifies agencies as regulatory, advisory or operational. "Corporations" are identified as a subset of operational agencies and are further divided into "funding" and "commercial," the latter appellation being applied to Crown corporations.[9]

In the United States, a very broad definition of government corporation has been adopted in the context of information disclosure laws. The Freedom of Information Act[10] explicitly includes within its scope any "government agency," a term which is defined in the following manner:

> For the purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President) or any independent regulatory agency. (emphasis added) 11

This definition goes beyond the Privy Council Office suggestion to include not only wholly owned but "government controlled" corporations

8 Id. at 5.

9 See discussion infra note 44 et.seq. and accompanying text.

10 Freedom of Information Act, 1974, 5 U.S.C., 552.

11 Id., 552(e).

within the scope of the FOIA. This expansion in scope rasies a question which is not dealt with in either 55l(l) or 552(c), what does "government controlled" mean?

The meaning of the term "control" in the context of corporations is not free from difficulty. "Control" could be interpreted to mean "actual control," i.e., the holding of a majority of issued voting shares, or "effective control," which in a widely held corporation could be as little as 10% - 15% of the voting shares.

This ambiguity could be avoided by adopting the definition found in An Act to revise the Audit Act,[12] which defines "Crown controlled corporation" as:

> ... a corporation that is not an agency of the Crown and having 50 percent or more of its issued and outstanding shares vested in Her Majesty in right of Ontario or having the appointment of a majority of its board of directors made or approved by the Lieutenant-Governor in Council, [13]

However the concept is defined, the prospect of subjecting Crown corporations to information disclosure laws raises the problem that disclosure may adversely affect the competitive position of the corporation vis-a-vis its suppliers and customers. This problem and its solution is discussed in the concluding section of this report.

12 S.O. 1977, c. 61.

13 Id., s. 1(e).

This study paper is divided into three chapters. The first chapter introduces the Crown corporation as a government organization and examines its political character by highlighting the issue of responsibility and accountability. It can be stated, unequivocally, that the primary goal of Crown corporations is to pursue public policy objectives and not profit. The public policy mandate is equally applicable to the operations of Canadian National Railways and Ontario Hydro as it is to Canada Council and Ontario Arts Council. The discussion includes reference to the categorization of Crown corporations by the governments of both Canada and Ontario.

The mandate and operations of Ontaria Hydro, the Urban Transportation Development Corporation, and the Ontario Northland Transportation Commission are briefly examined in the second chapter of the report. Reference is made to the information policies of these three Ontario non-departmental government organizations. The three organizations regard themselves as commercial corporations, and the notion of competitive interest is uppermost in their thinking, specifically when questioned about the possible application of freedom of information legislation which "may constrain their ability to compete in the marketplace."

The level of public disclosure in Canada is weak, particularly when compared to the United States. In the third and final chapter of the paper, questions of disclosure and information access are discussed.

CHAPTER II

CROWN CORPORATIONS

A. Federal Crown Corporations

The departmental structure of organization is basic to both the federal and provincial governments. There are government activities, however, for which this form of organization is not appropriate. For this reason, different organizational means have been developed which take the generic form of non-departmental bodies such as boards, commissions, or corporations. The activity to be performed is a major determining factor in the design of the organization.

> The public interest may require only that certain activities be regulated and a board or commission with some degree of independence from government be established to set rates or issue licences and set standards. Some economic activities are considered desirable but private industry is unable to absorb the initial costs and a corporation is established with the government as owner or shareholder. In other instances special incorporating legislation gives particular rights, powers, duties and privileges to a commission or corporation established by the government and responsible to the government for achieving specific goals which are considered to be in the public interest. There are virtually as many variations as there are boards, commissions, and corporations. The government or the Crown ensures the proper reflection of the public interest in each case by such means as legislated restrictions on activities; direct involvement financially as a partial, majority or sole shareholder; through the appointment of commissioners or board members and senior officers, through

> confirmation of decisions or periodic reviews of activities, etc. [14]

The federal government's non-departmental organizations, that is, Crown corporations,[15] are classified as follows:[16]

> 1) A departmental (Schedule B) corporation "is a servant or agent of Her Majesty in right of Canada and is responsible for administering supervisory or regulatory services of a governmental nature." [17]
>
> 2) An agency (Schedule C) corporation "is an agent of Her Majesty in right of Canada and is responsible for the management of trading or service operations on a quasi-commercial basis, or for the management of procurement, construction or disposal activities on behalf of Her Majesty in right of Canada." [18]
>
> 3) A proprietary (Schedule D) corporation "is responsible for the management of lending or financial operations, or for the management of commercial and industrial operations involving the production of or dealing in goods and the supplying of services to the public, and is ordinarily required to conduct its operations without appropriations." [19]

The departmental form of a Crown corporation typically functions as an integral component of the public service, subject to parliamentary

14 Report of a Study Group to the Postmaster General, Considerations Which Affect the Choice of Organization Structure for the Canada Post Office, (Ottawa: Supply and Services, 1978) at 10.

15 For discussion of possible definitions, see supra at 4-10.

16 Reference is to Schedules to the Financial Administration Act, R.S.C. 1970, c. F-10.

17 Id., s. 66(3)a.

18 Id., s. 66(3)b.

19 Id., s. 66(3)c(i)(ii).

appropriations, and its employees are either civil servants or are subject to special legislation. The agency form of a Crown corporation, on the other hand, orients management towards the employment of financial and other management systems more reflective of a commercial enterprise. The employees of the agency-type corporation have the option of continuing with collective bargaining under the Public Service Staff Relations Act or transferring to the Canada Labour Code. While these corporations submit their operating, capital budget and corporate plans to the government for approval, their internal affairs are seldom subject to the constraints imposed on departments. Nonetheless, the objectives of agency corporations are typically governmental in nature and the public interest is basic to the performance of their activities.

The proprietary corporation resembles the organizational form of the agency corporation; however, because it enjoys a high degree of independence from government controls, it tends to "function in the manner of private firms with many of the same motivations and competitive responses that would be encountered in private firms."[20]

> ... the public interest is satisfied by the act of creating a corporation which is then left free to manage its affairs subject to general policy direction from the government. The board of directors and the senior officers of the corporation are expected to act essentially as if the firm were privately financed and expected to generate earnings sufficient for continued growth and development. There

20 Supra, note 14, at 12.

> should be little or no recourse to the government or Parliament for financing. Such proprietary corporations as Air Canada and Petro-Canada compete in their respective industries and are subject to many of the same tests of success or failure as are similar, private firms. Should such corporations be requested by the government to undertake specific activities in the public interest, (e.g. reduced rates to encourage air travel by particular groups in the community to achieve publicly desirable objectives) compensation might be paid as to any privately held company. However, it is expected that all Crown corporations would be sensitive to public policy objectives, even those that are non-economic. 21

In 1978, there were some 176 federal Crown corporations. The term Crown corporation has been loosely applied in recent years by the public, including members of Parliament. A key point to be noted is that the pursuit of profit is not the primary function of Crown corporations, including the proprietary ones. While Crown corporations are expected to be efficient, their efficiency is not judged solely on the basis of the "bottom line" -- profit is not the prime goal, and the distribution of profit to the shareholders is seldom necessary. The primary purpose of Crown corporations, including those which operate and compete in the commercial environment, is to pursue public policy objectives.

21 Id.

B. Responsibility and Accountability

"Ontario has developed something over 300 independent and semi-independent organizations delivering a wide range of government services."[22] Most of these organizations were established after World War II; however, Ontario's experience with such government agencies dates back to 1906 with the creation of the Hydro-Electric Power Commission of Ontario. The reason for establishing such agencies outside the normal government departmental structure are many and varied, and include the following:[23]

. Administrative advantages, such as the ability to avoid the rigidities of official personnel regulations; this is important when it is realized that at the present time agencies account for some 40% of all persons employed by the government of Ontario.

. Agencies often have greater freedom in financial matters than departments; it is argued that such flexibility in personnel and financial administration favours more efficient and effective management.

. Greater ease in handling contractual and commercial arrangements for program development, experimentation and delivery of services to the public.

. A position detached from partisan politics which is essential for the performance of certain functions of a judicial or quasi-judicial nature.

. The agency form reduces the need for additional portfolios and ministries; it thereby acts as a brake on the unrestricted growth of big government.

22 Report to the Executive Council of the Government of Ontario (ECGO), Report no. 9 (Toronto: Committee on Government Productivity, 1973) at 3.

23 Id. at 37-38.

. Agencies provide means for flexible responses to public requirements.

. Agencies offer a channel for raising revenue in the form of premiums, fees and other charges, which seem to gain public acceptance more readily than direct general taxation.

. Agencies facilitate the development of intergovernmental programs.

. Agencies represent practical instruments for responding to local, sectional or regional interests.

. Where groups or individuals in the population have special interests in particular programs, an appropriate agency is an avenue by which they can convey information and advice to the government or achieve direct participation in the management of programs.

. Use of the agency organization permits a government to undertake commercial activities, where needed.

. In the many and increasing cases where contemporary government programs cut across different areas of jurisdiction, the agency is an instrument that promotes integration and coordination with a minimum of conflicts.

. Agencies constitute outlets for the sheer volume of government business, which appears to be on the increase.

Regardless of the reasons for establishing such government organizations, by the late 1950's the growth of agencies in Ontario generated the concern that their numbers and powers may have contributed to the lessening of parliamentary control and ministerial responsibility, i.e., they might operate beyond the control of the legislature. The Gordon Committee noted that "in Ontario, as in other places, government has increasingly become engaged in supervision of, and participation in, the life of the community and this has led to the delegation of powers

and responsibilities by the legislature to subordinate agencies in various forms.[24]

The issues of ministerial responsibility and financial accountability were examined by the Gordon Committee. Defining clear lines of authority and responsibility involving the legislature, Cabinet and the individual ministers to their departments and associated non-departmental organizations, such as boards and commissions, was held out as a pre-requisite to good government. Authority was to be realized in a descending order, while accountability (responsibility) was to be achieved in an ascending direction involving the different actors and their respective working relationships. Thus, governmental policy directives and organizational performance information should ideally lead to a situation where a Minister of the Crown can assume responsibility for the policies, for example, of those Crown agencies which fall under his political purview. This type of working relationship should help to ensure the avoidance of "instances of improper partiality and patronage."[25]

Financial accountability is a key safeguard to preserving ministerial responsibility. It is "accepted doctrine that sovereignty in financial

24 Walter Gordon (Chairman), Report of the Committee on the Organization of Government in Ontario, (Toronto, 1959) at 49.

25 Id., at 11.

matters is vested in Parliament, and that Parliament has the right and duty to require from the executive such accounting as will ensure that public business is being administered in the public interest.[26] In the case of most government agencies, funds are normally voted by the legislature which is supposed to be kept informed concerning the disbursement of funds. In the case of Ontario, there are three financial review procedures; the Spending Estimates Debates, the Provincial Auditor's Annual Report, and the investigative work of the Public Accounts Committee. There are some agencies, however, which generate much and conceivably all of their capital requirements without having to go to the legislature, such as Ontario Hydro. These agencies, however, are obliged to report annually to the legislature concerning their operations.

Approximately seventeen years after the publication of the Gordon Committee Report, the Auditor General of Canada in his 1976 Annual Report highlighted and severely criticized the federal government's financial management and control of Crown corporations, the corporations' own internal financial management and control, and their lack of accountability to government and Parliament.[27] Two major criticisms

26 Balls, "The Financial Control and Accountability of Canadian Crown Corporations," [1953] Public Administration at 127.

27 Don Gracey, "Public Enterprise in Canada," in Public Enterprise and the Public Interest (Toronto: The Institute of Public Administration of Canada, 1978) at 34.

stemmed from the fact that Crown corporations provided Parliament with incomplete and fragmented financial plans and inadequate financial reports, and that the financing methods employed by Crown corporations made it difficult to judge their management performance even if the central government administration bureaucracy had the responsibility of doing so.[28] The Air Canada episode,[29] coupled with the Auditor General's Report, ultimately led the government of Canada to issue a "Blue Paper" on Crown corporations.[30]

> The Commission of Inquiry into the affairs of Air Canada discovered a disturbing practice in Air Canada related to subsidiaries which is central to the issue of accountability. It was found that Air Canada, through its parent Canadian National, had established a subsidiary company. Yet, the accounts of that subsidiary were consolidated in neither Air Canada's nor CN's annual reports, with the result that the subsidiary's accounts did not reach Parliament in any form, even though the subsidiary operated at a substantial loss between 1973 and 1974. Further, and perhaps more importantly, the subsidiary was undertaking a business on behalf of Air Canada which it was not clear that Air Canada itself could undertake under the terms of the Air Canada Act approved by Parliament.
>
> Many federal Crown corporations have created subsidiary arrangements. Indeed the establishment of a subsidiary operation to undertake certain functions follows established business practice and is often necessary for good corporate management. Not all subsidiaries, however, have been consolidated in the parent's annual report or in the parent's financial accounting and control systems

28 See Report of the Auditor General of Canada to the House of Commons for the fiscal year ending March 31, 1976 (Ottawa), c. 5, at 34-63.

29 Air Canada Inquiry Report, (Ottawa: Information Canada, 1975).

30 Supra, note 4.

> and procedures, nor do they report separately to either Parliament or the government. Since many subsidiaries undertake important elements of the parent Crown corporation's business, any diminution of effective direct or indirect control and scrutiny by the government and Parliament over them implies dire consequences with respect to their accountability. 31

Shortly after the release of the Blue Paper on Crown corporations, the government of Canada signaled its intention to table an omnibus Crown Corporations Bill in Parliament.

> The purpose of the bill is to propose amendments to Part VIII of the FAA, clarify the roles and responsibilities of boards of directors of the Crown corporations, establish appropriate government control over the establishment of their subsidiaries and, most importantly, establish mechanisms for more effective communication between Crown corporations and the government while maintaining a degree of independence necessary for the efficient and effective conduct of their business and responsibilities. 32

The intent of the Bill would be to increase Parliament's ability to evaluate and monitor the performance of Crown corporations by improving the design and efficiency of the government's financial management system with respect to control and accountability. Some of the key areas for improvement include the role of boards of directors, the submission of corporate budgets, the formulation of corporate plans, the documentation of annual reports, the adherence to established financial practices, and the issuance of interim statements of accounts.

31 Supra, note 27, at 34.

32 Id., at 35.

The government recognized that,

> Owing to the speed with which Crown companies were created and as a result of the host of different purposes for which the companies were established, the government did not define either standard models for their creation, or systems by which the ministry, designated ministers or Parliament could exert effective control and direction over them and ensure adequate accountability from them. Accountability of Crown companies to Parliament was particularly weak. Crown companies could avoid Parliamentary scrutiny indefinitely as long as they did not require Parliamentary appropriations to finance operations. 33

One of the major difficulties in developing management reporting systems for Crown corporations results from the fact that they manifest themselves in a variety of forms with an equally diverse range of relationships with Parliament. This phenomenon was recognized by the Royal Commission on Financial Management and Accountability:

> The term Crown agency that appears in our terms of reference has no precise legal definition. The Commission views Crown agencies as a group of entities that has a different relationship to government and a different form of accountability than the conventional departments.
>
> The problem of definition is also one of classification. Crown agencies assume a variety of forms, and they span a spectrum of activities ranging from running a penitentiary service, a film development enterprise and an airline, to processing uranium, granting fellowships, purchasing art works, and offering advice on economic or scientific policy, and from regulating pipelines and licensing broadcasters to hearing immigration appeals.
>
> Schedules to the (Federal) Financial Administration Act provide a threefold classification of Crown corporations into departmental, agency and proprietary corporations, differentiated by function and by a progressively broader freedom from the regimen of financial controls set forth in the Act ...

33 Supra, note 5, at 12.

> Despite the variety of Crown agencies, they all share one common feature we would describe as a special status. All, in widely varying degrees, have been placed at arm's length from regular departments and their responsibility relationship is designed to provide the degree of managerial autonomy deemed essential for the most effective conduct of essentially commercial operations ... 34

Regardless of the type of Crown corporation, their annual budgets should serve as a useful check to their operations. To date, the quality and integrity of many Crown corporation budgets have been sadly lacking, thus failing to communicate to ministers and Parliament the long-term implications of their strategic decisions.

Boards of Directors constitute another key mechanism through which government and Parliament can promote control and accountability; however, there is no constituent statute of a federal Crown corporation which lists the role and responsibilities of a board of directors, or of the chairman and chief executive officer.[35]

> Yet boards of directors are instrumental in ensuring that government objectives are pursued in the most efficient and effective fashion, that the corporation is managed with due efficiency and probity, and that the corporation conducts

34 Canada, The Royal Commission on Financial Management and Accountability, Progress Report (Ottawa: Supply and Services Canada, 1977) at 45-46.

35 This is inapplicable to those companies incorporated under general corporations statutes which impose duties inter alia upon directors and executives of corporations under its jurisdiction.

> its affairs free from political interference not related to the implementation of government policy. 36

C. Ontario Agencies

The independent and semi-independent organizations which have been established by the Ontario government go under various names, such as agencies, boards, commissions and special purpose bodies. They are commonly referred to as "agencies," and are defined as follows:

> An organizational unit of government which is a subcomponent part of a ministerial portfolio receiving a particular form of delegated authority and representing one alternative to the departmental structure as a means of assisting in the formation of government policy, or delivering government programs, or executing the government's regulatory responsibilities. 37

Many "agencies" are governed by the Crown Agency Act:[38]

> In this Act, "Crown agency" means a board, commission, railway, public utility, university, manufactory, company or agency owned, controlled or operated by Her Majesty in right of Ontario, or by the Government of Ontario, or under the authority of the Legislature or of the Lieutenant Governor in Council.
>
> A Crown agency is for all purposes an agency of Her Majesty and its power may be exercised only as an agent of Her Majesty. 39

36 Supra, note 5 at 33.

37 Ontario, Management Board of Cabinet, Agencies, Boards and Commissions in the Government of Ontario, (Toronto: Management Policy Division, Management Board Secretariat, 1974) at 5.

38 R.S.O. 1970, c. 100.

39 Id., s. 1.

There is no uniform set of political and economic characteristics to distinguish the various Ontario agencies. For example,

> Political control and accountability vary greatly. Some agencies report direct to a minister or to a deputy minister. Some are closely controlled by elected officials, while others, though operating under what appears to be a tight reporting relationship, enjoy considerable independence. Still other agencies have no relationship with a minister or ministry or only slender links.
>
> Appointment to the office of chairman or as a member of a board of directors is generally made by the Lieutenant-Governor-in-Council, on the recommendation of the Premier or of a minister. Some are full-time appointments, others part-time ... Some members may be public servants, while in other cases private individuals may make up the entire board.
>
> Personnel practices differ considerably, especially in agencies to which the Public Service Act does not apply. Whereas some agencies have full-time staff, and still others use ministerial facilities.
>
> In financial matters, some agencies with their own sources of revenue are substantially self-sufficient; others are wholly dependent on the Consolidated Revenue Fund. In the main, practice in the use and disposition of revenue is inconsistent, and gradations occur in the extent of capital financing and control by the Government.
>
> Procurement and tendering practices not only differ among the agencies, but often do not conform to those set by the Government for its ministries. Variations in approach are also found in the submission of annual reports, estimates of expenditure and audits. 40

Ontario agencies pose problems of responsibility and accountability, similar to those of federal Crown corporations. They also present problems of classification, because there is no provincial legal

40 Supra note 24, at 34-40.

counterpart[41] to the Financial Administration Act which classifies most federal Crown corporations in terms of its schedules, however incomplete and inadequate. Partly in response to this problem, the Ontario Committee on Government Productivity in 1973 put together "the framework of an orderly system of titling and classifications," and produced what it believed to be "a first grouping of Ontario's government agencies into manageable categories."[42] Three basic groupings were developed for the more than 300 agencies -- advisory agencies, tribunals divided into administrative and judicial categories, and operational agencies classified into commercial and non-commercial. Table 1 presents a capsule description of the various agency categories by major activity.

A year later, the Ontario government Management Board Secretariat revised the classification system slightly, particularly with respect to the "non-commercial operational agency grouping." Institutes and foundations were replaced by "funding corporations" (created to channel consolidated revenue fund appropriations into particular activities rather than operating grants), "social program delivery agencies" (concerned with the delivery of programs to the public), and "research agencies."

41 An Ontario Financial Administration Act, R.S.O. 1970, c. 166, does exist but it lacks the disclosure provisions of the federal statute.

42 Supra note 24, at 3.

TABLE I

ONTARIO CROWN AGENCIES[43]

CATEGORY	ACTIVITY
Advisory Committee	provides advice to ministers and/or ministry officials
Tribunal	judicial tribunal which adjudicates rights by application of law
Commission	administrative tribunal which adjudicates rights by application of government policy
Corporation	engages in activities closely resembling those of commercial corporations in the private sector
Institute	non-commercial operational agency which engages in research activities
Foundation	non-commercial operational agency which is funded by private endowment as well as by government monies

43 Ontario, Management Board of Cabinet, Agencies, Boards and Commissions in the Government of Ontario, op.cit.

CHAPTER III

THE CORPORATIONS

The government of Ontario has become increasingly involved in commercial activities, i.e., the provision of goods and services at a price, which may or may not be offered in competition with private sector corporations. Examples of such public enterprise include Ontario Hydro, the Urban Transportation Development Corporation Limited, and the Ontario Northland Transportation Commission.

The corporate form of organization is an excellent vehicle for bridging jurisdictional boundaries, not only between public and private sector corporations, but between different political jurisdictions. For example, the Ontario Energy Corporation, established in 1974,[44] can invest or otherwise participate in energy projects throughout Canada and abroad. At this writing it is involved in a number of mixed (public/private) undertakings including the Syncrude project to produce crude oil from the Alberta tar sands. Another such corporation is the Urban Transportation Development Corporation Limited, which was established under the Ontario Transportation Development Corporation

44 Under the Ontario Energy Corporation Act, S.O. 1974, c. 101.

Act.[45] Most of the provisions of the Ontario Business Corporations Act apply to its operations.[46]

Ontario's government-owned corporations manage substantial financial resources which run into billions of dollars, and employ thousands of persons throughout the province. The impact of their commercial activities is extremely significant in social and economic terms. In the case of the latter, it is not merely direct employment, but employment with reference to hundreds of small and large Ontario-based companies which service the requirements of these enterprises.

The public is often unaware that certain commercial corporations are government-owned, and are not private sector companies. In some measure, the actions and speeches of executives of some of these corporations tend to blur the government-ownership characteristic of the corporation. Company reports and brochures also help to foster an ambiguous and ill-defined corporate image of their "government status." The executives, however, are not totally to blame for this phenomenon.

One of the key challenges facing Ontario's commercial corporations is how to achieve a proper balance between current government policy

45 S.O. 1973, c. 66.

46 See The Ontario Transportation Development Corporation Act, S.O. 1973, c. 66.

direction, and the formulation and implementation of profit-oriented corporate strategies typically phrased in socio-economic terms.

> Some agencies are intended to have economic objectives, which must be met subject to social constraints. Others have social objectives subject to economic constraints. In the former a very business-like managerial environment is required, undertaking the functional task but always with an eye to economic efficiency and eventual financial results. With the latter, management is more oriented to the fulfillment of the agency's social goals, maximizing the social benefits within the budgetary constraints. This is not to say that efficiency can be ignored, but to indicate that greater priority is given to the social goals, which may require the absorption of some uneconomic costs. The imposition and over-emphasis of social goals in an economically oriented agency, or economic goals in a socially oriented agency, is likely to produce managerial dissonance and frustration because primary purposes are being negated. For example, Ontario Hydro is not expected to price electricity below the cost of production because it would be socially desirable for the population to pay less for power 47

Frustration associated with trying to balance social goals and profit objectives has prompted some executives of government-owned corporations to favour the participation of private investors in the equity base of the operation. For example, Dr. Robert A. Bandeen, President and Chief Executive Officer of Canadian National, a Crown corporation, stated:

> There would be a number of additional advantages in CN having other stockholders besides the Federal government. It would mean reinforcement of the corporation's objective of operating along commercial lines, and would put it more closely in touch with the expertise and experience of the private entrepreneur.

47 Supra note 37, at 68.

> There are those who feel that a Crown corporation like CN should be concerned almost entirely with "social responsibilities" rather than profits ... But I think it would be socially irresponsible for Canadian National to provide services without any concern for their economic viability, and expect the taxpayer to bear the ever-increasing load.
>
> It should not be up to the management of CN to decide on subsidy programs to assist certain regions or commodities, or provide loss-making services required for national transportation policy. Decisions like this should be in the hands of the elected representatives of the people. Agencies such as CN can operate the required non-profitable services on the basis that the losses are paid from the public purse. It is important to keep a very clear line between those services which are not expected to be profitable and those which are if there is to be efficient management of both. 48

The operations and public information practices of three Ontario commercial corporations will be briefly examined to provide a backdrop for the discussion in the concluding section of this paper.

A. Ontario Hydro

Ontario Hydro is a special statutory corporation, established by the provincial legislature in 1906, which now administers an electric power enterprise having broad powers to produce, buy and deliver electric power throughout the province of Ontario. The Power Corporation Act[49]

48 Speech to Vancouver Board of Trade, January 17, 1977.

49 Previously entitled the Power Commission Act, R.S.O. 1970, c. 354, as amended by the Power Corporation Act, S.O. 1973, c. 57.

by which Hydro is governed stipulates that service be provided at cost, and defines cost as including charges for power purchases, operation, maintenance, administration, fixed charges and reserve adjustments.[50]

The province of Ontario guarantees the payment of principal and interest on all bonds and notes issued to the public by Ontario Hydro. In the case of public borrowing in the United States, the province borrows on behalf of Hydro by issuing its own debentures and advancing the proceeds to Ontario Hydro upon terms and conditions agreed upon between the Ontario Hydro and the Treasurer of Ontario. The prime concern of this corporation is the provision of electric power to municipalities for resale to the people of the province. Ontario Hydro also provides power to some direct industrial customers such as pulp and paper mills and mining operations, and to retail customers either in rural areas or in communities not served by municipal electric utilities. In addition to supplying power, Ontario Hydro exercises certain regulatory functions with respect to the electrical service provided by municipalities. Hydro maintains seven regional offices and 61 area offices in Ontario.

Ontario Hydro is administered by a board of directors that consists of a chairman, a vice-chairman, a president, and not more than ten other directors. In brief, the Ontario Hydro consists of those persons,

50 Id., s. 7(3).

appointed by the Lieutenant-Governor-in-Council, who from time to time comprise its Board. The Corporate Office, composed of the president and three vice-presidents, concentrates on overall corporate objectives and policies with day-to-day operations being the responsibility of seven general managers each of whom reports to a vice-president.

Based on the yardsticks of revenues, assets and employees, Ontario Hydro is one of Canada's largest industrial corporations. For the year ending 1977, Hydro's performance in the three aforementioned categories was approximately as follows: revenues -- $1.8 billion;[51] fixed assets -- $10 billion;[52] and employees -- 25,000.[53] Since the bulk of Hydro's operations are concentrated in Ontario, its impact on the provincial economy is exceptionally significant. This fact has not gone unnoticed; for example, the procurement policies of Hydro are of great interest to business in Canada. Excluding primary fuel, 86% of the total value of purchases made in 1977 were directed to Canadian sources, and 88% of this business was placed in Ontario.[54] Hydro's procurement strategy is designed to promote the development of Canadian suppliers where possible.

51 Ontario Hydro, Annual Report 1977 (Toronto: Ontario Hydro, 1977) at 15.

52 Id., at 16.

53 Id., at 25.

54 Id., at 24.

1. A Crown Corporation

The Reports of Task Force Hydro (1972-1973) recommended that Hydro's status be changed to a Crown corporation from a commission. The Crown corporation status was felt to be more appropriate because it provided for greater organizational distinctness, more flexibility, better opportunities for delegation of the administration of day-to-day business, and an opportunity for better account-keeping. In addition, the new corporate organization would "signal a break from the past to those in Hydro, to those in the utilities and to the public."[55]

The government of Ontario accepted this recommendation, and introduced the necessary amendments to the Power Commission Act in June, 1973. At that time, the Premier of Ontario made the following statement in the legislature:

> Under these amendments Ontario Hydro will, very properly, continue to be accountable to the Legislature. It will continue to be charged with delivering power at cost and with serving the best interests of all the people of Ontario. The corporate structure, however, will emphasize Hydro's operational independence and strengthen its ability to be progressive and to conduct its affairs in accordance with the best principles of enlightened commercial enterprise.
>
> At the same time this act, in conjunction with others being introduced today, will permit the Government to develop an overall policy for energy within which Ontario Hydro would operate. No longer is it appropriate for policy for electrical energy to be made without reference to policy on other forms of energy.

55 Task Force Hydro, Report No. 1, (Toronto: August 15, 1972) at 48-49.

> I should underline that Hydro's new corporate structure will not impair the fundamental relationship which it has always enjoyed with the municipally-owned distribution utilities.

2. The Corporate Board and Relations with Government and Public

Task Force Hydro recommended that the Board of Directors of Ontario Hydro should be "responsible to the Government for the operation of the Corporation and to receive the policy direction from the Government."[56] The channel for such policy direction is the Minister of Energy. The Task Force emphasized that not only would the Board ensure that Hydro's policy is consistent with government policy, but that government would look to the Hydro Board for counsel in formulating such policies as would affect Hydro. Thus, while the Board would be responsible for the overall direction of the delivery system, its primary role would be in the development of operational policy.

The Power Corporation Act,[57] states that the business and affairs of the Corporation are under the direction and control of the Board. The specific duties and responsibilities of the Board include the following:

56 Id., at 49.

57 S.O. 1973, c. 57, s. 4(1).

1) To translate government policy for Hydro into corporate policy, thereby giving direction to senior management;

2) To appoint and fix the renumeration of the president, vice-presidents and other officers of the Hydro Corporation;

3) To approve the policies for allocation of the cost of power and rate structures for both wholesale and retail sectors;

4) To approve the annual operating and capital budgets of the Corporation;

5) To approve the long-range strategic corporate plans;

6) To approve specific major capital expenditures and contracts;

7) To approve terms and conditions which are to apply to contracts between the Hydro Corporation and the distribution utilities;

8) To ensure that the policies and plans approved by the Board are being carried out satisfactorily, relative to pre-determined standards and time and cost targets;

9) To ensure that all interested parties, including the public, are fully informed of the Corporation policies, plans, objectives and activities.

In a Ministry Report submitted to the Royal Commission on Electric Power Planning, it is noted that

> ... while work is underway with the object of refining the structure and process of communication between Ontario Hydro and the Ministry Office and, indeed, their respective knowledge and understanding of the policy framework, the key variable is not the formality of the contract but the personalities and interpersonal relationships of the individuals who are responsible for making the system work. From the public's point of view, however, it is essential that there be clear understanding of the policy parameters given to Ontario Hydro by the Government. 58

58 Ministry of Energy Submission to the Royal Commission on Electrical Power Planning, Response to Question One, July 1976, at 32.

The Chairman of the Board has a key role to play in the relations of the Board with the government and the general public. The Chairman is appointed on a full-time basis and his orientation is outward, to the Ontario community and to the government. The President of Hydro on the other hand, performs a complementary role to that of the Chairman. He is responsible to the Board of Directors for directing the affairs of the Corporation in accordance with the goals and objectives established by the Board. The relationship between the Chairman and the President is particularly important. While the Chairman is the presiding officer, the President takes responsibility for the ongoing operation of Hydro.

3. Public Affairs

In 1972, Task Force Hydro noted that the shift from hydraulic to thermal generation prompted concern among different groups for different reasons: large power consumers expressed concern about escalating costs; air and water pollution became a major fear for the environmentalists; similarly, increasing demand for power signaled problems of land use for transmission and generation facilities.

These concerns can be classified as being one of two types: individual or consumer oriented on an operational level; and group centered and largely physical plant specific. The first type may involve questions

of rates, or the quality of service or supply. The second type of problem, for example, may be associated with the siting of power facilities.

Since Hydro is a "public corporation," the Task Force argued that it "has an obligation to take greater initiative in providing ample opportunity for an individual to seek redress." It was therefore recommended that "Hydro establish an office of Public Affairs headed by a Director of Public Affairs responsible to the Board for hearing grievances relating to services to the public rendered by Hydro and the distribution utilities."[59]

This recommendation was partially implemented through the appointment of an "Executive Coordinator of Public Affairs." This official is not part of the line organization, but has access to the Board since he reports to the President who is also a member of the Board. In 1978, the Executive Coordinator of Public Affairs had a staff of five persons.

Another area of concern centered on "relations with members of the legislature." Since no member of the provincial legislature serves on the Board of Hydro, the Task Force recommended that someone in Hydro be assigned the responsibility to answer problems brought to members

59 Task Force Hydro, Hydro in Ontario: An Approach to Organization, Report No. 2 (Toronto: December 14, 1972) at 64.

of the legislature by their constituents. The recommendation reads as follows:

> The Director of Public Affairs places himself at the disposal of members of the Legislature to ensure rapid and effective response to questions and complaints submitted by constituents about Hydro or the distribution utilities. 60

In spite of this recommendation, the minister to whom Hydro reports is still expected to answer questions on matters of policy in the legislature. Questions of an operational or administrative nature are also expected to be handled "by the minister on the basis of detailed responses prepared by Hydro and submitted through the office of the Chairman."[61]

The spirit of the foregoing recommendation was implemented, but in a somewhat different structural context. The members of the 1972 Task Force were not in a position to foresee the full impact of public hearings on the operations of Ontario Hydro.

> For Ontario Hydro, 1974 was the first year in which the Corporation as a whole felt the full force of the public hearing process. The two-part Ontario Energy Board (OEB) hearing that year consumed 98 hearing days, involved 53 Hydro witnesses, and filled 13,700 pages of transcript. In 1975, the main hearing was a major one by the OEB concerning 1976 Bulk Power Rates, extending over 55 hearing days, with 41 Hydro witnesses and 8,900 transcript pages. Also in 1975, a Select Committee of the Legislature took another look at the 1976 rate proposal in 19 hearing days

60 Id., at 62-63.

61 Id., at 64.

> and 3,000 pages of transcript. 1976 was the first year for hearings before the Royal Commission on Electric Power Planning. This hearing, plus the OEB rate review and a continuation of the Select Committee hearing, combined to produce 95 hearing days, with 99 Hydro witnesses and 18,000 pages of transcript. In 1977 the OEB started a generic hearing on the Costing and Pricing of Electricity, in addition to the annual rate review, RCEPP continued, and a special inquiry into the use of aluminum wiring in residential construction was started. These various hearings covered 143 hearing days, involved 38 Hydro witnesses and produced about 28,000 pages of transcript. With the Select Committee on Hydro Affairs planning to hold hearings throughout 1978, and all of these other hearings continuing, 1978 will be Hydro's heaviest hearing year yet. 62

Public hearings are a major element in the conduct of Hydro's business. Much corporate work goes into preparation for these hearings: approximately 7 to 8 times as many manhours are spent in preparation as in actual attendance at the hearings. Costs of salaries are estimated to exceed non-labour expenses (e.g., legal fees and printing) in a ratio of about 3 to 1. In 1977, for example, staff hours expended in preparation for hearings were about 49,000 compared with just over 7,000 in attendance. Hearings were estimated to have cost Hydro $1.8 million in 1977.

Costs directly attributable to public hearings, while large in absolute terms, are relatively minor in terms of the capital costs of projects.

62 John Dobson, "Public Hearings and Ontario Hydro," (Mimeo) July, 1978.

> Delays which may result from the hearing process can be far more costly. It is probably more correct to blame the delays on the total decision process than on the hearings themselves, but extended hearings can be a major factor in delays.
>
> A striking example of the cost of delays relates to the 500 KV transmission from the Bruce generating station. It is estimated that by 1986, if the second line from Bruce is not available as scheduled, there will be financial penalties due to locked-in energy of $300 to $600 million per year. 63

The concern with participation in the public hearings process has forced Hydro to develop a strong internal "Public Hearings Department," led by a manager with a staff of 12 persons. This secretariat coordinates the preparation of briefs for Hydro's executives who appear before various public hearing bodies. Public participation is not limited to the legislature:

> To ensure public debate and input in the matter of line and site locations, teams involving several disciplines within Hydro worked directly with citizens and elected officials. As an example, a total of 82 meetings were held in 1977 to examine and evaluate 24 projects falling under the new requirements and exemption clauses of the Environmental Assessment Act. In Eastern Ontario, this process identified four possible generating sites out of a possible 23. In each case the Hydro/citizens' groups examined the study area, the need for the facility and the alternatives available, as well as the environmental and socio-economic factors involved. At year's end, 28 additional projects were under active public participation planning. 64

In addition to the Public Affairs and Public Hearings personnel, there are some 75 persons employed in the Communications Services Department

63 Id.

64 Supra note 51, at 25.

which reports to the Director of Corporate Services. Management of the Library and Public Reference Centre are part of their responsibility. Thus, approximately 100 people are directly employed in Hydro's information policy and public participation areas of activity.

4. Release of Information

Ontario Hydro's policy on release of information is that it "should make the disclosure of information a natural part of its operating procedures."[65] The policy pursued is to respond to all requests they deem to be reasonable. Information which is typically withheld includes the following:

1) Matters under negotiation and matters requiring the concurrence of a second party involving contracts, employee relations, or dealings in property.

2) Working papers and preliminary or partially-completed reports.

3) Certain manuals, specifications and drawings and other documents in which Ontario Hydro has a proprietary interest.

4) Matters of policy under consideration.

5) Information concerning physical security systems within Ontario Hydro. [66]

65 Public Participation, Memorandum to the Royal Commission on Electric Power Planning with Respect to the Public Information Hearings, March 1976, at 1-2.

66 Id.

In those cases where the request for information may necessitate a rearrangement of different documents and/or extensive manhours of search and compilation, Ontario Hydro will normally try to persuade the inquirer to accept the information in the form supplied to government review bodies.

In its dealings with the Royal Commission on Electric Power Planning (the Porter Commission), Ontario Hydro acknowledged its unwillingness to release certain information, which if made public could be potentially harmful to its working relationship with some of its constituents. For example, nuclear safety reports are not to be made available to the public -- access is limited to "technically responsible persons," and can only be read in the presence of Hydro officials. The concern with commercial (market) sensitivity dissuades Ontario Hydro from releasing information about its supply contracts, as well as documents and reports which are considered to be draft or working papers. As a general guideline, Hydro officials tend to judge requests from the public by answering the question, "Why should I not release the information?"

B. The Urban Transportation Development Corporation Ltd.

In 1973, the Ontario legislature passed an Act[67] establishing The Ontario Transportation Development Corporation, which was to act as a catalyst in the public transportation industry. Its mandate was to design, develop and market new transit equipment and systems, and to stimulate commercial application of this technology by industry. The Corporation's role in the transit industry was to assume the development risks associated with both the improvement of conventional transit technology and the design of new high-quality transit systems.[68]

The Ontario Transport Development Corporation Act[69] specifies that "[T]he Corporation is not an agent of Her Majesty nor a Crown agency within the meaning of The Crown Agency Act."[70] Nonetheless, Ontario's participation in the Corporation, i.e., ownership and control, is effectively held by the government:

67 Ontario Transport Development Corporation Act, S.O. 1973, c. 66.

68 Ontario Legislative Assembly, UTDC Presentation to the Estimates Committee, Sessional Paper No. 149, 2nd Sess., 31st Parl., June 22, 1978 (mimeo).

69 Ontario Transport Development Corporation Act, S.O. 1973, c. 66, s. 13.

70 As long as the Crown holds all the shares, and if the corporation acts as a policy instrument of the government, the courts will deem it to be an agent, regardless of this clause.

> 15. (1) The Minister shall from time to time subscribe for, purchase and hold shares of the Corporation on behalf of Her Majesty in right of Ontario and such holdings at all times shall be a majority of the outstanding shares of the Corporation.
>
> (2) Shares of the Corporation purchased on behalf of Her Majesty in right of Ontario shall be registered in the books of the Corporation in the name of Her Majesty in right of Ontario as represented by the Minister and may be voted by the Minister or his duly authorized nominee on behalf of Her Majesty in accordance with such regulations as the Lieutenant-Governor-in-Council may prescribe.
>
> 16. The Treasurer of Ontario, with the approval of the Lieutenant-Governor-in-Council and upon such terms and conditions as the Lieutenant-Governor-in-Council may prescribe, may make loans to the Corporation and may acquire and hold debt obligations of the Corporation as evidence thereof. 71

Further, as with other Ontario government-owned commercial corporations, whether deemed Crown agencies or agents of Her Majesty or not, the Corporation's Board of Directors are appointed by the Lieutentant-Governor-in-Council, future members are to be elected by the Corporation's shareholders (and the statute ensures majority control is held by the Ontario government), and the Corporation's activities are reported to the legislature through a Minister of the Crown.

In 1974, the Board of Directors recommended legislation to the province to permit the Ontario Transportation Development Corporation to transfer the bulk of its assets and liabilities to a new corporate entity —

71 Ontario Transport Development Corporation Act, S.O. 1973, c. 66, ss. 15, 16.

the Urban Transportation Development Corporation Ltd. (UTDC). The corporate transfer materialized because the government was anxious to encourage the shareholding participation of federal and other provincial governments in its federally-chartered (under the Canada Corporations Act) Urban Transportation Development Corporation. Such participation has yet to materialise.

In 1978, UTDC employed some 120 people, most of whom are based at its Transit Development Centre, a 480-acre site just west of Kingston where both hardware and systems are tested. UTDC absorbed a loss of $13,235,853 for the year ending December 31, 1977.[72]

1. Government and Public Affairs

None of the Board members are drawn from government, and only one member is an employee of UTDC -- the President. UTDC's headquarters is in Toronto, where the Manager of Government and Public Affairs has responsibility for the corporation's information program, public affairs and advertising. His unit consists of 2-1/2 persons, has an annual budget of approximately $150,000 and he reports to the Vice-President of Marketing. UTDC has been in the public eye since its

72 Ontario, Ministry of Transportation and Communication, Urban Transport Development Corporation, Annual Report 1977, (Toronto: UTDC, 1977) at 24.

creation. Its existence and performance is constantly under attack, and it is a prime target for newspaper criticism and parliamentary questions. UTDC's president devotes a substantial part of his time to briefing the minister, meeting with political and interest group representatives, in addition to answering criticism from the mass media.

UTDC executives contend that much of the criticism can be attributed to "fuzziness about the Corporation's mandate, misinterpretation of its motives, and distortion of its activities." The end result is that much of the president's time is spent in responding to these charges; time taken away from the commercial task at hand. A few examples were offered to illustrate this point.

UTDC was maligned in an editorial article titled "Ontario's Transportation Fiasco" in the March 1977 issue of The Bus and Truck Transport magazine. The attack was sufficiently embarrassing and distorted that it required the president of UTDC to prepare an 11-page briefing for Ontario's Minister of Transportation. Some of the points made in the briefing included, "UTDC is not a manufacturer of transit equipment," "UTDC has never let a contract without a full competitive bidding procedure," and "All UTDC financial operations and accounting procedures have been fully disclosed in its financial reports."

Newspaper criticism of UTDC is inevitably picked up by members of the political opposition in the legislature, forcing the minister to

respond in the House. For example, two articles in the Toronto Sun entitled "Taxpayers Taken for Ride" and "A Snow Job on Transit,"[73] formed the basis of questions raised in the legislature by members of the Liberal Party and the NDP.

During the course of this debate, an important point was made by the minister on the subject of auditing government-owned commercial enterprises:

> Recently there was discussion in this House regarding what was referred to as an audit of UTDC and to avoid any misunderstandings, I tabled the UTDC-ICTS project, phase three, interim audit for the period January 1, 1976, to March 31, 1977. That document made reference to the minutes of the post-audit review and I was requested by the Leader of the Official Opposition to table those minutes. I agreed to do so and I am tabling them today.
>
> In the question of the Leader of the Opposition, he mentioned a final audit. I should make it clear that the audit staff of my ministry does not carry out an audit of the books of UTDC per se, as it is a corporation and it has its own outside auditors.
>
> My audit staff is only involved in the limited role of ensuring that invoices, which we receive under the loan agreement between TEIGA and UTDC with respect to phase three of the ICTS program reflect only charges which are properly payable thereunder. If my staff are of the opinion that a charge is not proper, it is only a rejection of the item as chargable under the financing agreement and not an indication that the expenditure by UTDC was in any way improper.
>
> Since this subject was discussed in the House, the provincial auditor has pointed out that it is not customary for the working papers of an auditor, which these documents are, to

73 Claire Hoy at Queen's Park, Toronto Sun, May 2 and 3, 1978.

> be made public. In fact, the Audit Act, which was passed in December, specifically prohibits the laying of the provincial auditor's working papers before this assembly or any committee of the assembly. There are sound reasons for this as an auditor, like a lawyer, must feel completely free to make frank and often subjective comments to his clients. On reflection, I have concluded that I should not establish a practice of tabling such reports in the future as a matter of routine.
>
> In his question, the Leader of the Opposition also referred to the monitoring role which my ministry plays under the financing agreement. I am today tabling copies of the ICTS agreements. The agreement between my ministry and UTDC requires that the information which is provided to my staff in their monitoring role is to be kept strictly confidential and I would be in breach of that agreement if I were to make it available. There are corresponding secrecy provisions in the contracts between UTDC and its subcontractors.
>
> UTDC is a business in a highly competitive industry engaged in the development of new products and concepts, the value of which would be in jeopardy if information made available to my ministry were made public. 74

UTDC contends that in the area of corporate disclosure, they have to meet more exacting requirements than their private sector counterparts. Besides satisfying private sector accounting standards, additional information requirements must be met by virtue of government ownership of the corporation, and the minister's responsibility to the legislature. For example, the presentation made by the President of UTDC to the Estimates Committee of the legislature includes more detailed information than typically contained in a company's annual report. This information is public knowledge and prospective competitors are

74 Ontario, Legislature, Debates, June 1, 1978 at 3015.

among its most interested readers. A recent presentation includes the following reference to UTDC's briefings, "UTDC maintains a policy of fulfilling requests for in-depth information about its development programs and activities through briefing sessions. Both Canadian and non-Canadian groups and individuals have been accommodated." Table II provides a partial list of these briefings.

Generally speaking, anyone interested in reading UTDC's technical reports may do so, provided it is done in the premises of the Corporation, and in the presence of one of its employees. These reports include studies undertaken by outside consultants. Photo-copying is not permitted because some of the information in the documents is considered to be proprietary. Management acknowledges that UTDC's nature as a government-owned corporation demands greater disclosure, more detailed scrutiny, a higher level of accountability, and easier access to information governing its operations and activities. Nonetheless, it contends that most questions raised to date have little to do with its social and economic mandate; instead, the focus, especially in the legislature, is largely directed at embarrassing the minister and thus the corporation, by highlighting questionable commercial practices considered normal in business, such as overseas travel accommodation and executive expense accounts.

TABLE II

SELECTED UTDC BRIEFINGS

August 1976	-	F. McKenzie, F. Lewinburg (NDP Research)
August 1976	-	D. Dotchin (Executive Officer & Assistant, Provincial Secretariat for Resources Development)
August 1976	-	Streetcars for Toronto Committee
August 1976	-	J. Bonsall, Transport Planning Director, Regional Municipality of Ottawa-Carleton
December 1976	-	J. Creelman (Liberal Party Research)
January 1977	-	Eglinton Ratepayers Association
February 1977	-	Progressive Conservative Caucus (Ottawa)
February 1977	-	P. Cosgrove, Mayor of Scarborough
March 1977	-	P. Detmold, Transportation Development Agency
May 1977	-	Calgary Alderman
July 1977	-	Representatives of Federal Department of Industry, Trade and Commerce
July 1977	-	Representatives of the Canadian International Development Agency
July 1977	-	Representatives of the Canadian Export Development Corporation
October 1977	-	Executive Committee, American Public Transit Association
November 1977	-	Urban Mass Transportation Administration (Washington)
May 1978	-	USA/Canada Joint Program in Urban Transportation Technology and Systems

C. The Ontario Northland Transportation Commission

The enabling legislation for this enterprise is the Ontario Transportation Commission Act.[75] The Ontario Northland Transportation Commission (ONTC) defines its objectives as managing a transportation and communications system which will provide a service in the best interests of its customers, the communities it serves, its employees and its owners who are the people of Ontario.[76]

The responsible ministry for ONTC is the Ministry of Northern Affairs. Previously, this responsibility was held by the Ministry of Transportation and Communications, which appears to be the more appropriate reporting relationship for ONTC. The change in ministerial responsibility is explained in terms of political, rather than managerial and operational factors. Thus, officials from both ministries are involved in the key decision-making areas, since the activities of ONTC are greatly affected by Ontario's transportation and communication policies and programs. What this means in effect is that the senior operating executives of ONTC meet and consult with

75 R.S.O. 1970, c. 326.

76 From a legal point of view, of course, the Crown is in fact the owner of the corporation. In practice, the Crown is represented by the Governor in Council or the Lieutenant-Governor-in-Council in the provinces. Conventional wisdom may have it that the ultimate shareholder is the public represented by Parliament, but this has no basis in constitutional theory or law.

officials of both the Northern Affairs and Transportation and Communications Ministries -- specifically, the two Deputy Ministers.

ONTC does not have a board of directors per se; instead, the Lieutenant-Governor-in-Council appoints "commissioners." In 1978, there were seven commissioners, including the Chairman. For the year 1977, ONTC realized revenues of approximately $62 million,[77] had gross investment in property of approximately $164 million,[78] and employed some 2,000 people with a payroll of about $31 million.[79] The head office is situated in North Bay, with a branch sales office in Toronto. While responsibility for policy implementation rests with the Commissioners, the day-to-day direction of the organization is the responsibility of the principal officers of ONTC. In 1978, the senior executive was titled General Manager, and his management group consisted of four other senior executives.

The Minister of Northern Affairs exercises close control over the policy direction of ONTC. The commissioners (Board) meet monthly and the minister tries to attend as many of these meetings as possible, usually four a year. The minister is not a member of the commission

77 Ontario, Ministry of Northern Affairs, Ontario Northland Transportation Corporation, Annual Report, 1977 (Toronto: ONTC, 1977) at 17.

78 Id., at 14.

79 Id., at 9.

(Board), and attends the meetings in an ex-officio capacity as does the General Manager. The principal executive officers of ONTC, in turn, meet regularly with officials of the Ministry of Northern Affairs and the Ministry of Transportation and Communications.

The Provincial Auditor reviews ONTC's accounts and expenditures, as does the Audit Branch of the Ministry of Northern Affairs. The revenues and receipts of ONTC are applied to the payment of all costs, liabilities, obligations, and expenditures incurred or made by the enterprise. In the event of surpluses, they would be paid into the Consolidated Revenue Fund at such times and in such amounts as the Lieutenant-Governor-in-Council would direct.[80]

ONTC's books of accounts are open to inspection by the Treasurer of Ontario or any of his agents. At the close of each fiscal year, ONTC files with the minister an Annual Report which includes the report of the Provincial Auditor. This Annual Report describes the operations of ONTC for the fiscal year and contains information which the commissioners consider important to the public interest, as well as that which is required by the Lieutenant-Governor-in-Council. The minister submits the report to the Lieutenant-Governor-in-Council and lays the report before the Assembly. Only the annual report is published and made available to the public. This pattern of reporting

80 Id., at 8.

and disclosure is comparable to that of federal Crown corporations under section 75 of the Financial Administration Act.

The close working relationship between ONTC and the minister is partially attributable to the significant "non-commercial" part of its business; i.e., services which are non-profitable but deemed necessary by the government. These services are largely related to the passenger train part of the business. For example, ONTC received in excess of $10,000,000 in subsidies from the Ontario government of which more than one-third was for the "Northlander."[81]

The "Northlander" rail passenger service commenced regular operation in June of 1977 between Timmins and Toronto, and between North Bay and Toronto. "It was well received by the public, but because user charges and consequent federal subsidies had yet to be settled, the North Bay-Toronto local service was curtailed after seven months of operation.[82] From the perspective of the two ministries -- Northern Affairs and Transportation and Communications -- and ONTC, the "Northlander" service is costly and questionable because demand requirements for its service are not high. However, a strong and vocal interest group, made up of sophisticated passenger train buffs, has succeeded in ensuring its operation. This pressure group is committed

81 Supra note 79, Schedule 3 at 23.

82 Id., at 7.

to increasing the frequency and distance of the "Northlander" service. Members of this ad hoc pressure group include individuals with a high degree of technical sophistication, some of whom are employed by Ontario government ministries and agencies. They are in a good position to marshal and document technical data in support of their position. Lengthy letters and briefs from such groups are usually directed to the minister responsible for ONTC.

ONTC employs two persons in the public relations area. Most of their time is spent on advertising, e.g., the design, preparation and printing of folders, train schedules and related sales promotion material. The budget for advertising and public relations was in excess of $500,000 in 1977, but the bulk of it was spent on the former. So far ONTC has not had to involve itself in preparing briefs for public hearings because policy issues and matters relevant to its activities are normally dealt with by the ministry. Letters of complaints from disgruntled customers and municipalities are usually directed to the minister, and his officials tend to deal with these complaints as well.

At this time ONTC's mandate appears to be under increasing attack by some of its private sector competitors. The political pressures are sufficiently troublesome to merit comment in the "Report of the General Manager" in ONTC's Annual Report for 1977.

Public ownership has long been accepted by Canadians, but economic conditions have affected the degree to which they feel it is necessary. The present weak economy and accompanying problems of serious inflation and unemployment have again focused attention on the role of government, just as they did after the Great Depression. Whereas at that time, however, people reflected on the need for government to mobilize our resources in peacetime as it was able to do during the War -- today an articulate sector of society blames the growth and intervention of government for our troubled economy. Privatization and deregulation have become for many the keys to renewed economic health.

Against this backdrop, Star Transfer has become the subject of a controversy precipitated, no doubt, by rising costs, numerous illegal operations, and the first steps towards deregulation of the industry which together have intensified competition and reduced industry profitability to an average of about 5%. 83

83 Id., at 8. (ONTC purchased Star Transfer Limited in 1960.)

CHAPTER IV

FREEDOM OF INFORMATION

A. Public Disclosure

In recent years, the autonomy and independence of federal and provincial Crown corporations have been shaken up. The Air Canada Inquiry, the Auditor General's 1976 Report, and the two Public Accounts Hearings involving Atomic Energy Canada Limited and Polysar identified problems of control and accountability vis-a-vis the (federal) government, and raised questions of corporate ethics involving improper payments and commercial behaviour.

The relative independence of and lack of control exercised by government over Crown corporations has generated some concern on the part of elected officials. Politicians are aware that the public will hold them accountable for the actions of these corporations, regardless of the so-called arm's length relationship which is supposed to exist between ministers and the corporations. This was apparent in the case of AECL, where the public record shows that the Minister of Energy, Mines and Resources had little prior knowledge concerning the questionable sales strategy employed by the Crown corporation to sell CANDU reactors to South Korea and Argentina. Members of Parliament, however, persisted

in holding him responsible for AECL's actions.

Two observations can be drawn from the foregoing case studies. First, members of the opposition, triggered by the release of the Auditor General's Report and sundry leaks, used their legislative powers to obtain more information than Crown corporations are normally willing to divulge. Second, government's and specifically the minister's inability to deal satisfactorily with the questions raised in the House illustrated problems related to ministerial responsibility, and the apparent lack of accountability of Crown corporations.

That opposition members tried to use their information to embarrass the government cannot be denied. Their motive is inherent in the political interplay which characterizes the democratic parliamentary process. It is equally true, however, that the use of this information with respect to the activities of Crown corporations serves as a necessary legislative check on the Cabinet, and specifically on the minister responsible for the corporation who is ultimately accountable to the public. Any discussion of the general topic of "freedom of information" involving Crown corporations must take into account the role and powers of members of the legislature, and their access to government information.

Increasingly, members of the legislature will have to deal with issues traditionally considered to be internal to the management of Crown corporations. The current debate on the issue of social responsibility

and private sector corporations appears to have a public sector counterpart, i.e., public accountability and the Crown corporation. A discussion of the latter issue can be gleaned from the submissions and testimony presented to and heard by the Ontario government's Select Committee on Ontario Hydro. Public activism and the tendency to question established institutions and their related policies and practices via greater public disclosure will undoubtedly force governments, and their ministers, to bring under closer scrutiny the operations of government-owned corporations. To date, these corporations have enjoyed relative political autonomy; that is, little government intervention in their business affairs, while being spared much of the scrutiny typically aimed at their private sector counterparts.

1. Open Business

Secrecy is the first rule of public and private sector bureaucracies whether they are dealing with citizens, regulatory agencies or Parliament. In the case of corporate bureaucracies, the argument for limiting disclosure is inevitably linked to the so-called "exigencies of the free enterprise system," which would supposedly be impaired if additional disclosure was compelled. Yet, how can this view be reconciled with Adam Smith's notion that, "the success of competition

depends on the knowledge of consumers and competitors"?[84] Coupled with the corporate interpretation of the free enterprise sytem are the "impassioned pleas for privacy for the corporate 'person' from the prying eyes of the public and competitors."[85]

Arguments in favour of greater disclosure are inevitably linked to the promotion of the public interest; that is, more and better information is the surest way of protecting the public interest. Proponents of this position maintain that current political and legal disclosure requirements are too narrow, so that society has insufficient information about the operations of large modern industrial corporations and their probable social and economic impacts. For example, in a brief received by the Royal Commission on Corporate Concentration from the Task Force on the Churches and Corporate Responsibility, it was urged that major corporations be required to disclose on request the following additional information:

> a) personnel policy and practice relating to employment conditions, equal opportunities, labour relations, wage structures, in-service training and accident prevention;
>
> b) operating policy and practice relating to environmental protection and community impact;
>
> c) product quality and safety; and
>
> d) military contracts. [86]

84 R. Nader, M. Green and J. Seligman, Taming the Giant Corporation, (New York: W.W. Norton & Co. Inc., 1976) at 137.

85 Id., at 138.

86 Canada, Royal Commission on Corporate Concentration, Report, (Ottawa: Supply and Services, 1978) at 319-320.

A point made in favour of greater disclosure was that it is not only correct in principle but may also be an effective deterrent to harmful conduct. Corporations receiving substantial sums of money in the form of loans, grants, subsidies, tax exemptions and concessions, and other forms of public funds or assistance should have to meet the highest standards of Canadian public filings, which are relatively minimal compared with American standards. This information should be made available and known to the Canadian public since public funds are used to finance and aid the corporations. Yet because of the ownership character of Crown corporations, even the present disclosure requirements are not met by many of them.

Information and corporate disclosure requirements in the United States are more stringent than in Canada. It is not uncommon for Canadians to obtain information about certain Canadian issues and concerns from Washington, which Canadian governments and their agencies refuse to divulge. Canadian companies whose shares are traded on United States stock exchanges are obliged to file periodically documents which contain more information about their operations in Canada than that filed in Canada. For example, Form 10-K which must be filed annually with the U.S. Securities Exchange Commission is a more complete statement of a company's operations and activities than that filed with the Ontario Securities Commission.

The number of people employed in the public affairs and information services area, the size of the public relations budget, the quality of

annual reports, press conferences and releases, seminars, employee publications, special company reports, corporate histories, consultations and involvement with interested community groups, and submissions to and appearances before royal commissions and parliamentary committees are some of the indicators and benchmarks which one might employ to determine the "openness" of Crown corporations.

Of the three corporations examined in Chapter III of this study, Ontario Hydro appears to be the most open, followed by the Urban Transportation Development Corporation and lastly by the Ontario Northland Transportation Commission. The size of operation (assets, employees and revenue), the nature and sensitivity of the product produced and/or service sold, the management style of the organization, the political sophistication of the responsible minister, and the number and quality of "leaks" connnected with the activities of the corporation are among the major factors which determine its "openness," i.e., information policy. On this particular point, it became quite obvious that the government-owned corporations were not inclined to provide any more information than was legally required and politically necessary.

B. Information Access

Corporate secrecy is rooted in the competitive character of the private economy. Corporate managers normally claim a right to secrecy because of the need to maintain a competitive edge. Economists, on the other

hand, tend to regard disclosures as promoting competition in general instead of competitors in particular. Thus if more information is made available about competitors, competition would under most circumstances be spurred which in turn would be salutary for the overall optimal efficiency of the economy.

> Information plays a critical role in the efficient working of a free enterprise economy. Generally speaking, the greater the amount of information which is possessed by all the groups which are interested in a given market, the more efficient the market will work. Other things being equal, then, society stands to reap benefits from the discretion. 87

Why are Crown corporations secretive? Numerous reasons were offered to explain the concern with confidentiality, of which the following four were considered to be among the most important:

> 1) Crown corporations wish to protect their competitive position;
>
> 2) Crown corporations justify their refusal to provide information on the basis of the so-called arm's length principle and the Morrisonian concept of public enterprise -- information should not be provided to Parliament which gives rise to parliamentary scrutiny and debate, and possibly intervention, into the day-to-day affairs and operations of the corporation;
>
> 3) Crown corporations do not want to provide information which will allow relatively low level bureaucrats to second guess management; and
>
> 4) Crown corporations like to perceive themselves as being in the private sector and hence tend to downplay their connection with government. Consequently, they are often inclined to ignore requests for information that come from government.

87 As the Federal Trade Commission noted in advancing its "Line of Business Reporting Program," in Taming the Giant Corporation, supra, note 84, at 137.

As a general observation, many Crown corporation executives contend that Parliament and the public more frequently than not ask silly questions which require considerable time, energy and money to answer. Moreover, some of the information requested is often publicly available. Many members of Parliament don't make use of the information they get at the present time. Annual reports are infrequently considered by parliamentary committees, while capital budgets are rarely examined in detail.

These reasons, however, do not comprise conditions sufficient to exempt federal and provincial Crown corporations from legislation concerned with freedom of information. Of the legislation presently in force, the United States Freedom of Information Act (FOIA) merits careful scrutiny from the standpoint of its applicability to the Ontario, and for that matter Canadian, situation.

1. The United States Freedom of Information Act

Present business criticism of the United States Freedom of Information Act has its genesis in the amendments to the legislation which went into effect in February, 1975.[88] Briefly, the amended FOIA seems finally to have brought an end to a long-standing government philosophy which stressed secrecy, and substituted an effective law emphasizing the right of every person to clear access to government records without having to explain "why" the information was requested.

The legislation imposes affirmative duties on agencies of the federal government to make information available to the public. The term "agency" is defined under the statute as "each authority of the government whether or not it is within or subject to review by

88 The United States Freedom of Information Act was passed in 1966, and went into effect on July 4, 1967. The Act was amended in 1974, becoming effective in February, 1975. Further amendments were made by the United States Government in the Sunshine Act in March, 1977 which limits the usage of exemption 3 under the amended 1975 Act by such agencies as the FAA that claimed that a substantial portion of its records was exempt by statute. For a more detailed examination of the American legislation, see M.Q. Connelly, Securities Regulation and Freedom of Information (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 8, 1979).

another agency."[89] This definition includes executive departments, military departments, government corporations, government-controlled corporations and independent regulatory agencies.[90]

The following nine categories of information are exempt under the American freedom of information legislation:

1) Specifically authorized and properly classified as secret in the interest of national defence or foreign policy;

2) Related solely to the internal personnel rules and practices of an agency;

3) Specifically exempted from disclosure by statute;

4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

5) Inter-agency or intra-agency memoranda or letters not otherwise available by law except to an agency in litigation with the agency;

6) Personnel, medical and similar files whose disclosure would constitute an invasion of privacy;

7) Under some circumstances, investigatory records compiled for law enforcement purposes;

8) Records related to the regulation or supervision of financial institutions;

9) Geological and physical information and data, including maps, concerning wells.

89 5 U.S.C. 551(9)(e).

90 5 U.S.C. 552(e).

The exemptions are discretionary in the sense that even though a particular kind of information may be exempt, a government agency has the power to decide whether to release the information in question, and indeed, will do so provided that there are no compelling reasons for withholding the information. Further, if parts of a requested document are covered by one or more of the nine exemptions, the exempted portion will be deleted and the edited version will be released. Such a provision appears to be necessary if the intent of the legislation is not to be blunted.

> Although the nine exemptions protect many categories of information, the FOIA's importance lies not in what it protects but in what it makes available. In a sense, the FOIA has created an involuntary communication channel between businesses. Thus, much of the information that businesses provide, willingly or unwillingly, to the government has become accessible to competitors through this more open government library. 91

Under the American legislation, one of the major concerns is to establish the proper balance between access and business confidentiality. This pertains to the fourth exemption with respect to trade secrets and commercial or financial information obtained from a person and privileged or confidential. It is the government agency's responsibility to determine whether the information requested falls within the exemption category. The FOIA grants no right to submitters to prevent disclosure, and accordingly, many submitters have brought claims against

91 D.B. Montgomery, A.H. Peters and C.B. Weinberg, "The Freedom of Information Act: Strategic Opportunities and Threats," 19 Sloan Management Review, No. 2, at 3.

the government attempting to enjoin disclosure of submitted information which they consider sensitive. Such claims have been styled "reverse FOIA suits," and in some cases have met with success.[92]

Experience to date with the Freedom of Information Act in the United States suggests that an increasing number of firms are using this legislation as a management tool for gaining some differential competitive advantage. The following two examples highlight this fact.[93]

1) In August of 1975, Air Cruisers Company received approval of its design for a 42-person inflatable life raft for commercial aircraft from the Federal Aviation Authority (FAA). This approval gave Air Cruisers a competitive advantage over its rivals. Some six months later, Switlik Parachute Company, a competitor, used the FOIA to gain portions of the data submitted by Air Cruisers to the FAA. This data included information concerning the design and testing of the Air Cruiser FAA-approved raft. The Switlik request was blocked by Air Cruisers when it filed suit in federal court; however, in doing so, Air Cruisers had to release certain documents such as buoyancy calculations for the raft and a diagram of its floor area. Switlik's Director of Research and Development admitted that this information enabled his

92 These suits are now in doubt in light of the U.S. Supreme Court decision in Chrysler v. Brown, No 77-922, April 18, 1979.

93 Burt Schorr, "How Law is Being Used to Pry Secrets From Uncle Sam's Files," Wall Street Journal, May 9, 1977, at 1, col. 6.

company to speed up the design of its own large raft and win a significant European contract away from its competitor, Air Cruisers.

2) The Food and Drug Administration received nearly 22,000 applications under the FOIA in 1976 for files on firms that it regulated. One such request, made by a Washington lawyer, involved an agency inspector's report on conditions in a Midwestern plant of a large pharmaceutical manufacturer. The report contained competitively sensitive information such as a description of proposed new products, manufacturing capabilities and sterilization procedures at the inspected plant. The assumption in this instance is that the Washington lawyer represented the interests of a competing firm.

In summary, the American legislation applies to all government organizations, departmental and non-departmental. It would appear that businesses and their lawyers are among the major users of the legislation because of the commercial intelligence which can be collected by gaining information access to corporate documents deposited with government agencies. The exemptions to the FOIA are designed to protect the proprietary interests of the corporations, as well as to ensure that disclosure will not bring competitive harm. On the other hand, they are not aimed at defeating the intent of the legislation, namely to promote open government.

Although the U.S. has no Crown corporations which are strict legal equivalents of the Canadian institution, some of their non-departmental

government organizations -- boards, agencies, commissions -- resemble federal and provincial Crown corporations. Moreover, if the United States did have a counterpart to our commercial Crown corporations, the FOIA would encompass their operations.

A few Canadian Crown corporation officials contend that the American statute is being used to undermine the essence of corporate confidentiality. Information about a company's plan for hiring minorities (e.g., women) may be potentially embarrassing but not commercially critical. It is with respect to the latter point that officials become upset. For example, heavy investment in the design of a product such as a mass transit vehicle, if disclosed to a competitor, may seriously threaten the corporation's competitive strength. Although the FOIA bars government officials from handing over "privileged or confidential" commercial or financial data, these officials tend to feel that U.S. administrative and court interpretations of the FOIA have been too lax.

One serious implication of this phenomenon in the U.S. is that businessmen are more reluctant to engage in "voluntary" disclosure to government agencies for fear that their data will be released without discrimination under the FOIA. This is the case with respect to the Securities and Exchange Commission in Washington which has been obliged to make public a number of its company files. The files included voluntary disclosure of bribes and related illegal or questionable payments. The identities and locations of the recipients of the improper

payments was the real cause for concern, because of their probable impact on the companies' ability to compete in foreign markets where business ethics and reliance on confidentiality may differ from that of the U.S.

Interestingly enough, this very issue of employing questionable international business practices on the part of Crown corporations forced the government of Canada on December 16, 1976 to issue a statement on "Government Policy and Guidelines Concerning the Commercial Practices of Crown Corporations." On January 18, 1977 Robert Andras, then President of the Treasury Board, included the following remarks in a letter to all Cabinet Ministers:

> ... officials of Crown corporations and public servants not only must act within the law at all times, but also must act as though the Criminal Code of Canada were in force in all places where they may engage in commercial transactions on behalf of the Crown corporations and of the Government. The policy specifically prohibits the giving or accepting of bribes or influence. The guidelines are designed to ensure a greater degree of compliance with this policy and are to be used as a foundation for the procedures and practices in the area of international trade.
>
> I am writing to all Ministers to advise them of the steps being taken to implement the policy and to provide model letters which have been drafted in accordance with the Cabinet decision. The first model letter is for the guidance of any Crown corporations named in Schedules C and D of the Financial Administration Act that are within your jurisdiction and the second is for the guidance of government-appointed directors of any mixed enterprises in which you act as the trustee shareholder on behalf of the government.

The political implication of the government's policy statement is obvious; namely, Crown corporations, including those engaged in the competitive marketplace, are constituent parts of the government

community albeit they may employ a corporate, rather than a departmental, form of organization. There can be no mistaking the responsibility of the minister for the Crown corporation.

In the area of international business, some Crown corporations are not only participants in selling, but also in buying substantial quantities of goods and services. These transactions run into millions of dollars. Ontario Hydro, for example, a major purchaser from the private sector, voiced concern that its tendering ability could be jeopardized under freedom of information legislation, e.g., potential disclosure of sensitive data -- financial, technological, and commercial. This concern, however valid, is not sufficient to exclude Ontario Hydro from the application of such legislation. It is understood that Ontario Hydro's procurement powers are viewed and used directly and/or indirectly by the Ontario government to promote certain public policy goals, such as technological and regional development. The public interest in gaining access to this information documenting how such public policy goals are formulated and implemented should not be denied, and would be consistent with the thrust of any reasonable freedom of information legislation.

C. Concluding Observations

The federal government Green Paper on "Legislation on Public Access to Government Documents" made the following remarks concerning the

application of its proposal to "commercial Crown corporations":

> Most proprietary corporations under the current Schedule D could not reasonably be expected to comply with the requirements of a statute owing to the competitive business environment in which they function. 94

The author disagrees with this reasoning because these government-owned corporations should not be judged nor treated like private sector corporations for the following reasons; they are instruments of public policy, they consume vast quantities of public funds or rely on government backing for their financing, and they are more often than not monopolies or oligopolies. In addition, information about the operations of all Crown corporations must be provided to members of Parliament in order that they may hold the ministry or minister to account for the exercise of the shareholders' prerogatives.

Generally speaking, most of the Crown corporation officials interviewed were not familiar with the federal government Green Paper or the American Freedom of Information Act. Fewer still were aware of the mandate of Ontario's Commission on Freedom of Information and Individual Privacy. After some explanation, two observations were offered by the interviewees. First, Crown corporations should be exempt from any freedom of information legislation, particularly those directly or indirectly involved in the marketplace. Second, Crown corporations by virtue of their political character should divulge sufficient information short of jeopardizing their competitive survival.

94 Canada, Secretary of State, Legislation on Public Access to Government Documents (Ottawa: Supply and Services Canada, 1977) at 23.

When pushed on the point of what would happen if freedom of information legislation were to cover Crown corporations, a number of potentially interesting implications were outlined. A scenario was envisioned wherein much of the information currently expressed in writing by corporation officials would be orally communicated. The life-span of documents would be shortened considerably; some would be destroyed on receipt, such as letters and memos which contained sensitive observations about persons inside and outside the organization. The style and content of corporation reports would be dramatically altered; the authors of these documents would be concerned that disclosure of their studies by various lobby groups might jeopardize their effectiveness and possibly their careers, because the public would not be cognizant of the circumstances under which some of the studies were conducted.

The United States Freedom of Information Act addresses itself to the concern of commercial secrecy in the marketplace by the inclusion of exemption 4, which exempts from the operation of the FOIA

> trade secrets and commercial or financial information from a person and privileged or confidential. (emphasis added) [95]

When viewed in the light of the activities of commercially active Crown corporations, however, the specific wording of the U.S. exemption raises an important question. Would the exemption protect commercially

95 5 U.S.C. 552(b)4.

sensitive documents which have not been received by the Crown corporation nor given to any government agency or department subject to the legislation? The U.S. exemption applies to information submitted to government by outsiders (e.g., commercial information submitted by applicants for loans from the Ontario Development Corporation) but not to information generated by government itself. The papers that would be produced internally by the corporation and remained there would conceivably include such information as trade secrets or bargaining strategy vis-a-vis suppliers for the upcoming year, and if disclosed, could be very damaging to the position of the corporation.

This serious problem is clearly dealt with in section 36 of the draft Australian Minority Report Bill, which states:

> c) a document containing a trade secret of an agency or, in the case of an agency engaged in trade and commerce, commercial or financial information that would expose the agency unreasonably to disadvantage, and
>
> d) a document containing the results of scientific research undertaken by an agency where the research project or that part of a research project to which the results relate is not yet complete or where the agency intends to sell the results of the research ... 96

Rather than exempting the commercial Crown corporation in a wholesale fashion from government access legislation, as was suggested by the Green Paper, adoption of the Australian Minority Report Bill provisions would protect these corporations from disclosures potentially damaging

96 Australia, 2 Royal Commission on Australian Government Administration (Canberra: Australian Government Publishing Service, 1976).

to their competitive position while allowing disclosure of all other non-exempt documents subject to the legislation.

The recommendation that all Crown corporations, including the Schedule D type, be covered by a freedom of information statute is based on the assumption that the primary objective of government ownership is to have these corporations pursue public policy objectives. The challenge in applying such legislation to Crown corporations is to strike a balance between legitimate claims for withholding information and the essential right of the public to know what is going on in their government-owned corporations.

APPENDIX A

Please complete Questionnaire where applicable and return it to:

Standing Committee on Procedural Affairs
Room 1411, Whitney Block
99 Wellesley Street West
Toronto, Ontario, M7A 1W3

		1975-76	1976-77	1977-78
1.	Total Expenses:			
2.	Expenses in the following Categories:	1975-76	1976-77	1977-78
	a) Salaries & Benefits			
	b) Transportation & Communications			
	c) Services			
	d) Supplies & Equipment			
3.	Who determines the way in which the agency allocates its expenditures?			
4.	Source of funding:			
5.	Amount of Government Grant:	1975-76	1976-77	1977-78
6.	Number of employees:	1975-76	1976-77	1977-78
	a) Government Appointees			
	b) Elected Officers			
	c) Other Officers			
	d) Office Staff			
	e) Professional Support Staff			
	i) Full Time			
	ii) Consultants			

COMMISSION RESEARCH PUBLICATIONS

The following list of research publications prepared for the Commission may be obtained at the Ontario Government Bookstore in Toronto, or by mail through the Publications Centre, 880 Bay Street, 5th Floor, Toronto, Ontario M7A 1N8.

Prices are indicated below. Orders placed through the Publications Centre should be accompanied by a cheque or money order made payable to the "Treasurer of Ontario."

Further titles will be listed in the Ontario Government Publications Monthly Checklist and in future Commission newsletters.

The Freedom of Information Issue: A Political Analysis
Research Publication 1
by Prof. Donald V. Smiley, York University $2.00

Freedom of Information and Ministerial Responsibility
Research Publication 2
by Prof. Kenneth Kernaghan, Brock University $2.00

Public Access to Government Documents: A Comparative Perspective
Research Publication 3
by Prof. Donald C. Rowat, Carleton University ..... $3.00 (Reprint)

Information Access and the Workmen's Compensation Board
Research Publication 4
by Prof. Terence Ison, Queen's University ..... $5.00 (Reprint)

Research and Statistical Uses of Ontario Government Personal Data
Research Publication 5
by Prof. David H. Flaherty, University of Western Ontario $2.00

Access to Information: Ontario Government Administrative Operations
Research Publication 6
by Hugh R. Hanson et al. $2.00

Freedom of Information in Local Government in Ontario
Research Publication 7
by Prof. Stanley M. Makuch and Mr. John Jackson $2.00

cont'd ...

Securities Regulation and Freedom of Information
Research Publication 8
by Prof. Mark Q. Connelly, Osgoode Hall Law School $2.00

Rule-Making Hearings: A General Statute for Ontario?
Research Publication 9
by Prof. David J. Mullan, Queen's University $2.00

Freedom of Information and the Administrative Process
Research Publication 10
by Larry M. Fox $2.00

Government Secrecy, Individual Privacy and the Public's Right to Know: An Overview of the Ontario Law
Research Publication 11
by Timothy G. Brown $2.00

Freedom of Information and Individual Privacy: A Selective Bibliography
Research Publication 12
by Laurel Murdoch and Jane Hillard,
with the assistance of Judith Smith $2.00

Freedom of Information and the Policy-Making Process in Ontario
Research Publication 13
by John Eichmanis $2.00

Information Access and Crown Corporations
Research Publication 14
by Prof. Isaiah A. Litvak $2.00